



IN THE SUPREME COURT OF THE STATE OF DELAWARE

COMMERCE ASSOCIATES, LP and )  
and 1000 COMMERCE CENTER, LP, )  
Appellants, ) No. 218, 2016  
v. )  
NEW CASTLE COUNTY OFFICE ) APPEAL FROM THE SUPERIOR  
OF ASSESSMENT and NEW ) COURT OF THE STATE OF  
CASTLE COUNTY BOARD OF ) DELAWARE  
ASSESSMENT REVIEW, ) C.A. No. N15A-07-009 DCS  
Appellees. )

**APPELLANTS' REPLY BRIEF**

**SAUL EWING LLP**  
Richard A. Forsten, Esq. (#2543)  
Olufunke Fagbami, Esq. (#6151)  
1201 N. Market Street, Suite 2300  
Wilmington, Delaware 19801  
Tel: (302) 421-6800  
Fax: (302) 421-6813  
*Attorneys for Appellant*

July 29, 2016

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
NATURE AND STAGE OF THE PROCEEDINGS .....	1
ARGUMENT .....	2
<b>I. IT IS LEGAL ERROR TO IGNORE A PROPERTY’S AGE AND CURRENT PHYSICAL CONDITION (I.E., DEPRECIATION) IN VALUING A PROPERTY FOR TAX ASSESSMENT PURPOSES.....</b>	<b>2</b>
<b>A. Delaware Law Holds That All Factors Which Affect Value Are Relevant And Must Be Considered – And These Factors Include Depreciation.....</b>	<b>2</b>
CONCLUSION .....	12

**TABLE OF AUTHORITIES**

**CASES**

*Delaware Racing Ass’n v. McMahon*,  
340 A.2d 837 (Del. 1975) .....2, 3

*Excelsior Associates, L.P. v. New Castle County Dept. of Finance*,  
1995 WL 347380 (Del.Super.).....3, 7

*Gottdiener v. Township of Roxbury*,  
2 N.J.Tax 206 (Tax Ct. N.J. 1981).....11

*New Castle County v. New Castle County Bd. of Assessment Review*,  
2008 WL 1904266 (Del.Super.), *aff’d*, 970 A.2d 257 (Del. 2009) (text  
available in Westlaw, 2009 WL 7900360) ..... passim

*Ren Centre L.L.C. v. New Castle County Office of Finance*,  
2016 WL 399328 (Del.Super.).....4, 7, 8, 10

*RRHC v. New Castle County Office of Finance*,  
2014 WL 2538886 (Del.Super.), *aff’d*, 108 A.3d 1226 (Del. 2014).....10, 11

*Seaford Associates, L.P. v. Bd. of Assessment Review*,  
539 A.2d 1043 (Del. 1988) .....3

**STATUTES**

9 *Del.C.* §1318(2) .....13

9 *Del. C.* §§8310-8312.....11

## NATURE AND STAGE OF THE PROCEEDINGS

Appellants challenge New Castle County's tax assessment of their property because, despite the fact that their property is more than 30 years old, New Castle County refuses to consider depreciation when assessing any property constructed in or after 1983 and, instead, treats such property as if it were brand new – an action which is contrary to Delaware law (which holds that all factors which affect value must be considered) and is also arbitrary and capricious inasmuch as the County has taken depreciation into account when assessing other properties, including properties *newer* than Appellants' property.

Appellants filed their Opening Brief on June 16, 2016 and Appellees filed their Answering Brief one month later. In their Answering Brief, the Appellees pitch this case as nothing more than a “battle of the experts” and claim that the Board was free to accept the County's approach to value (ignoring depreciation entirely) over Commerce's approach. Not so.

As an independent body, when presented with a property tax appeal, the Board of Assessment Review is to determine an accurate (or as accurate as possible based on the evidence before it) assessment based on all factors which affect value. The Board cannot accept a flawed methodology as the basis for an assessment, and this matter should be remanded to the Board for further proceedings which take depreciation into account.

## ARGUMENT

### I. **IT IS LEGAL ERROR TO IGNORE A PROPERTY'S AGE AND CURRENT PHYSICAL CONDITION (I.E., DEPRECIATION) IN VALUING A PROPERTY FOR TAX ASSESSMENT PURPOSES**

#### A. **Delaware Law Holds That All Factors Which Affect Value Are Relevant And Must Be Considered – And These Factors Include Depreciation**

As observed in Appellants' Opening Brief, under Delaware law, property is to be assessed for tax purposes at its "true value in money," meaning its "fair market value" – "the price which would be agreed upon by a willing seller and a willing buyer, under ordinary circumstances, neither party being under an compulsion to buy or sell." *See* Op.Br. at 11. Delaware courts have consistently explained that: "[A]ll elements entering into the value of property are relevant and must be considered by the assessors." *Delaware Racing Ass'n v. McMahon*, 340 A.2d 837, 843 (Del. 1975) (emphasis added).

Nowhere in its Answering Brief does the County dispute or question this fundamental principle. Indeed, at the hearing before the Board, the Board's counsel reiterated this very point, explaining to the Board:

I'll just note that the courts have said the Board should be considering all factors affecting value. That includes functional obsolescence and depreciation.

A-110. Thus, neither party to this appeal disputes the applicable law: all relevant factors must be considered.

In its presentation to the Board, Commerce presented evidence concerning depreciation<sup>1</sup> and its effect on value. The condominium units in question are more than thirty years old. A-27-28. The building itself is just as old and suffers from elements of obsolescence. A-15, 52. Although cutting edge when constructed, the units now face competition from newer, more modern buildings in the market. These are relevant factors which affect value. *See, e.g., Seaford Associates, L.P. v. Bd. of Assessment Review*, 539 A.2d 1043 (Del. 1988) (newer rival shopping center led to reduction in older shopping center's assessment).<sup>2</sup>

Moreover, in its Opening Brief, Commerce cited other Delaware cases where the Board has taken depreciation into account. In *Excelsior Associates, L.P.*

---

<sup>1</sup> For ease of terminology, Commerce uses the term “depreciation” to include not only physical wear and tear, but also functional and economic obsolescence. *See, e.g., Delaware Racing Ass’n v. McMahon*, 340 A.2d 837, 843 (Del. 1975) (“Depreciation has been held to include: physical wear and tear occasioned by the elements; functional obsolescence by reason of inadequate design and deficiencies in the property itself for the intended purpose; and economic obsolescence by way of the conditions that environ a structure [(i.e., changes in the neighborhood, such as new competition)]”).

<sup>2</sup> Ordinarily, the mere fact that properties age (i.e., depreciate) doesn't necessarily mean that their assessments should be reduced every year or even very often. Although properties age, their market value usually increases at a rate greater than depreciation, and most properties experience gains in value from a rising market, such that trending their current market value back to 1983 will yield their approximate assessed value. Nevertheless, some properties, such as the shopping center in *Seaford*, or the office condominiums here, do experience a diminution in value over time due to depreciation, such that their current value trended back to 1983 does result in a lower assessment. In this regard, the Board of Assessment Review acts as a safety valve for some properties and helps ensure that the tax burden is distributed equitably and fairly.

*v. New Castle County Dept. of Finance*, 1995 WL 347380 (Del.Super.), the Superior Court specifically approved a valuation analysis *that included depreciation* for a building *constructed in 1983*. More recently, in *Ren Centre L.L.C. v. New Castle County Office of Finance*, 2016 WL 399328 (Del.Super.), the Superior Court found that for a building constructed in 2007, “the Board intended to assess the building at a value that accounted for depreciation” but then inadvertently omitted depreciation from its calculations. Accordingly, the Superior Court remanded so that depreciation could be factored into the assessment. Finally, in *New Castle County v. New Castle County Bd. of Assessment Review*, 2008 WL 1904266 (Del.Super.), *aff’d*, 970 A.2d 257 (Del. 2009) (Table) (text available in Westlaw, 2009 WL 7900360) (the “Verizon Case”), the County itself applied a one-time five (5%) percent depreciation rate to outdoor plant and equipment installed by Verizon, even though almost all of this equipment was installed *after* 1983.

Yet despite the uncontroverted principle of Delaware law that all relevant factors are to be considered, and despite other cases where depreciation has been considered, the County nevertheless attempts to justify its refusal to include depreciation, claiming (wrongly) that: (1) the Board is free to consider competing evidence and methodologies (*i.e.*, the evidence presented by a property owner and the evidence presented by the County) and then pick and choose the evidence it

deems most reliable (but, this does not authorize the Board to accept evidence contrary to Delaware law); (2) the cases relied upon by Commerce are somehow distinguishable (but, they are not); and (3) the Board actually considered depreciation and rejected it (but it did not). Ultimately, the County argues that this case is nothing more than a “battle of the experts” and that the Board was free to accept the evidence and testimony of the County’s expert over that of Commerce’s expert. None of the County’s arguments have merit.

**1. The Board is not free to accept “evidence” contrary to Delaware law.**

The County spends the majority of its Answering Brief reviewing the evidence presented by the County to the Board in an effort to demonstrate that the County’s analysis was credible and could provide a basis for the Board’s decision. *See* Ans.Br. at 8-10, 12-25. For example, the County notes that the 1983 cost of construction was approximately \$432,900, arguing that the Board could therefore uphold the assessment since the 1983 actual cost of construction is approximately the current assessment – however, here and elsewhere, the County misses the point. Did it present extensive “evidence?” Did it present various facts and figures? The answer, of course, is yes. The County offered quite a bit of data. But, the error with the County’s analysis is that it completely omitted a relevant factor affecting value – depreciation – and went so far as to say that it could not include depreciation for any property constructed in or after 1983. Thus, the



volume of the County's evidence is irrelevant. The County's entire analysis is fundamentally flawed. Because the County purposely omitted depreciation from its analysis, for a building more than 30 years old, its analysis was contrary to Delaware law, and cannot provide a basis for an assessed value.

As just one example of the flaws in the County's analysis, consider the County's claim that the 1983 actual cost of construction is approximately the same as the assessed value, and therefore the assessment could be upheld. However, Delaware courts have always explained that in using the cost method to determine value, one *starts* with the cost to construct the improvements brand new *and then subtracts depreciation*. The County's cost approach omits the second, crucial step – accounting for depreciation. Similarly, when engaged in the sales comparison approach to value, one must use *comparable* properties, which, in this case, would be properties which are not brand new, but are older. Finally, the same problem infects the County's income approach, as it causes the County to use the higher rents and lower expenses associated with a brand new building, rather than an older building. No matter what approach is used, if one decides to ignore the effects of thirty plus years, and instead treat the property as if it were brand new, then the assessment is going to be higher than it otherwise should be. As a result, when the County argues that the Board merely “weighed” “the evidence,” and the Board's decision is supported by substantial evidence (*i.e.*, the County's analysis),

the County's entire argument is premised on a falsehood. The County's analysis and presentation to the Board, no matter how voluminous, and no matter how many facts and figures it contained, cannot support the Board's decision because it omits depreciation – a relevant factor affecting value – and is therefore contrary to Delaware law.

**2. Other Delaware cases recognize depreciation as a relevant factor, including cases involving buildings built in 1983 (the base year) and after 1983.**

In its Answering Brief, the County attempts to distinguish *Excelsior*, *Ren Centre*, and the Verizon Case, but these efforts fail. For example, with respect to *Excelsior*, the County concedes that the property owner's analysis included depreciation, and that the Superior Court ordered the assessment be set in accordance with the property owner's analysis, but then argues that *Excelsior* doesn't apply here because in that case the County did not present any evidence of its own. Ans.Br. at 26-27. True enough. The County didn't present any of its own evidence in that case – but that “distinction” misses the point. The Superior Court accepted the analysis of the property owner for a building constructed in 1983 that included eleven years' worth of depreciation (the appeal was filed in 1994, eleven years after the County's 1983 base year). If the County's position is that no depreciation should be considered for buildings constructed in 1983, then

the Superior Court should have rejected the property owner's evidence and left the assessment as it was.

Similarly, the County attempts to distinguish *Ren Centre* on the basis that the parties in that case (that is, the property owner and the County) *agreed* that the Board intended to include depreciation but inadvertently failed to do so. Ans.Br. at 28. But, again, the County's "distinction" misses the point. In *Ren Centre*, the Board meant to include depreciation as part of its analysis and the Superior Court remanded the case so it could do so. If the County's position here – that no depreciation should be considered for buildings constructed in or after 1983 – were correct, then the *Ren Centre* Court should not have remanded the matter, but should have simply affirmed the Board's decision. After all, how can depreciation be relevant for a building constructed in 2007, but not for a building constructed in 1983?

Finally, with respect to the Verizon Case, the County claims the issue there wasn't whether depreciation should be considered, but whose analysis (the County's or Verizon's) was more accurate. Ans.Br. at 26. Yet again, the County's "distinction" misses the point. The Verizon Case is relevant here because, in that case, the County included depreciation in its analysis for property installed after

1983.<sup>3</sup> Thus, by its own actions in the Verizon Case, the County concedes that it is proper to consider depreciation for property installed or constructed after 1983.

**3. The Board did not consider depreciation in its analysis, but, to the extent it did so, then the Board, too, acted contrary to Delaware law.**

In its Answering Brief, the County claims that the Board did consider the issue of depreciation because the Board's written decision makes mention of the fact that Commerce did include depreciation in its analysis. Ans.Br. at 21-22. The County then argues that the Board merely weighed the competing evidence and found that the County's evidence, including the fact that it ignored depreciation, was superior to Commerce's analysis which took depreciation into account.

This argument by the County is really just another twist on its argument that depreciation need not be considered – indeed cannot be considered – for properties constructed in and after 1983. Put another way, the County claims that the Board

---

<sup>3</sup> In the Verizon Case, the County applied a one-time five (5%) percent deduction to all newly-installed equipment, whether installed in 1983, 1993, 2003 or any other year, and never again made any adjustments for depreciation thereafter. Verizon, however, made adjustments based on the year of installation. The Board accepted Verizon's analysis as more accurate and the Superior and Supreme Courts both upheld the Board.

For our purposes here, the point is that, in the Verizon Case, the County included depreciation as part of its analysis for equipment installed *after* 1983 – a position entirely inconsistent with its position here. Indeed, not only is the County acting contrary to law by failing to take into account all relevant factors; but, it is treating some taxpayers, like Verizon, differently than others because it is incorporating depreciation in some, but not all, cases.

was free to adopt the County's approach (and ignore depreciation) as part of "weighing" the evidence.

However, as explained in Appellants' Opening Brief and at the outset of this Reply Brief, *all* relevant factors which affect value are to be considered. The Board isn't free to ignore depreciation just because the County's presentation didn't include depreciation. Both the Board and the County are bound by Delaware law and must consider *all* relevant factors.

Moreover, the Board, like the County, must be uniform its approach. The Board can't uphold the use of depreciation in some cases (e.g., the Verizon case, *Ren Centre*, etc.) and ignore it in others. Such an approach is the very definition of arbitrary and capricious behavior and an additional ground for reversal.

**4. The previous case involving Commerce Associates is not applicable here.**

Finally, the County cites to *RRHC v. New Castle County Office of Finance*, 2014 WL 2538886 (Del.Super.), *aff'd*, 108 A.3d 1226 (Del. 2014) (Table), a previous tax appeal case involving several units in the Commerce Building, including the units here, and claims the issue of depreciation was resolved in that case and is therefore binding here. Ans.Br. at 29. In truth, no such resolution was reached, depreciation was never discussed in the Court's opinion, and the *RRHC* case has no application to this case.

In *RRHC*, Commerce, along with three other unit owners in the Commerce Building, brought a property tax appeal to the Board, which the Board denied.<sup>4</sup> On appeal to the Superior Court, the property owners made several arguments – but, significantly for our purposes here, the *RRHC* Court never mentioned, addressed or considered the issue of depreciation. Indeed, the word “depreciation” does not appear anywhere in the *RRHC* decision. Thus, the *RRHC* decision, involving a different tax year and different arguments, simply has no bearing here.

In fact, Commerce brought this appeal specifically to focus on the depreciation issue, arguing to the Board and the Court below that the County’s valuation method is fundamentally flawed because it omits depreciation – a relevant factor affecting value – and treats all properties constructed in or after 1983 as brand new. The Court below, while mentioning the argument, never addressed the issue, and Commerce therefore brought this appeal to this Court.

---

<sup>4</sup> As a matter of jurisprudence, each tax year brings with it a new annual assessment and a new case of action. *See generally* 9 *Del.C.* §§8310-8312. A property owner is free to bring a new tax appeal to the Board every year, should the property owner so choose, and there is no *res judicata* effect resulting from previous appeals. *See, e.g., Gottdiener v. Township of Roxbury*, 2 N.J.Tax 206 (Tax Ct. N.J. 1981) (“each annual assessment of property for taxation is a separate entity, distinct from the assessment of the previous or subsequent year”) (citations omitted). Moreover, as already explained, the *RRHC* Court never discussed or decided the depreciation issue. Since there was no discussion or decision relating to that issue, there can be no *res judicata* or other effect.

## CONCLUSION

In assessing property for tax purposes, all relevant factors which affect value are to be considered. That has been and remains the law of Delaware concerning property tax assessments. Nevertheless, the County takes the erroneous position it is free to ignore depreciation, obsolescence, and, indeed, anything else concerning a property's current condition when it comes to office buildings and other properties improved in 1983 or thereafter.

Such a "blindness" approach may be easy to administer and may be convenient to use when defending challenged assessments, but it is wrong. Depreciation is a relevant factor and must be considered. Indeed, in other cases, depreciation has been considered. Moreover, the County's position has the effect of unevenly and unfairly distributing the tax burden because properties constructed in the late eighties and early nineties, which have depreciated, will nevertheless be taxed as if no depreciation has occurred, and thus pay more in taxes relative to new properties built in the last few years, which have depreciated far less.

The County's suggestion that this case is nothing more than a "battle of the experts" misses the point. Experts are bound, in coming to their conclusions, to follow the applicable law. They are not free to ignore Delaware law regarding property value simply because they are "experts," nor is an administrative agency

or board free to ignore Delaware law in favor of an expert's opinion that is contrary to that law.

The base year system must take into account all relevant factors, including present condition. The County's refusal to consider depreciation for properties improved after the base year of 1983 violates Delaware law. The Board, upon realizing that the County was failing to consider depreciation, should have adjusted the assessments at issue; as the General Assembly has directed the Board to do so upon finding an over-assessment. *See 9 Del.C. §1318(2)* ("If the Board should find that the assessment is greater than it should be, the Board shall order the [assessment reduced]"). Accordingly, this matter should be remanded back to the Board for a new hearing. In the absence of relief, this Court will have redefined the base year system such that the current condition of a property will become irrelevant, and the goal of an equitable distribution of the tax burden will be thwarted.

SAUL EWING LLP

/s/ Richard A. Forsten  
Richard A. Forsten, Esq. (#2543)  
Olufunke Fagbami, Esq. (#6151)  
1201 N. Market Street, Suite 2300  
Wilmington, Delaware 19801  
Tel: (302) 421-6800  
Fax: (302) 421-6813  
*Attorneys for Appellants*

July 29, 2016